

Corporate Update - Changes in Ohio Limited Liability Company Law

Wegman Hessler Client Alert

Jacob E. Debus

Ohio's Limited Liability Company law, as it exists in Ohio Revised Code ("ORC") Section 1705 (the "Original Act"), was originally enacted in 1994. On January 8, 2021, Governor Mike DeWine signed into law a new scheme of regulations governing limited liability companies ("LLCs") in Ohio. The new scheme does not simply amend prior Section 1705, but it will completely replace it with ORC Section 1706 (the "Revised LLC Act"). The intent of the Revised LLC Act is to modernize aspects of the Original Act by using the regulations found in the American Bar Association's Revised Prototype Limited Liability Company Act as a guide, while retaining some of the provisions and terms of the Original Act for convenience. Because of the retention of many of the key provisions and terms of the Original Act, LLCs existing before the application of the Revised LLC Act will continue to be recognized as valid, and LLCs' documents will also continue to be valid and enforceable; however, many LLCs may benefit from taking advantage of the new rules contained in the Revised LLC Act, which may be accomplished by amending their current documentation once the Revised LLC Act becomes effective. The Revised LLC Act will become effective February 11, 2022. Below is a brief outline of some of the pertinent changes:

Management Structure of LLCs

The Revised LLC Act will no longer distinguish between "member-managed" LLCs and "manager-managed" LLCs. The practical effect of this change will be to allow more flexibility in choosing which persons involved in an LLC have authority to bind the LLC to contracts and make decisions regarding the LLC's management. Under the new regime, an LLC's structure and authority may be established in multiple ways including, but not limited to, using the LLC's operating agreement or filing a Statement of Authority (form 613, attached below) with the Secretary of State; although, it is still not required that LLCs file documents identifying managers, members, or officers by name.

Penalties for Improper Registration and Enforcement

The Revised LLC Act provides for stricter requirements regarding registration of LLCs. The Revised LLC Act mandates fines for LLCs that fail to properly register with the Secretary of State and grants the Ohio Attorney General authority to take required action against improperly registered or unregistered LLCs.

Maintaining Statutory Agent

The Revised LLC Act requires an LLC to maintain a statutory agent at all times. If an LLC fails to maintain an active statutory agent, the LLC will be notified of this deficiency by the Ohio Secretary of State. If the agent is not updated or amended within thirty days of notification, the Ohio Secretary of State may cancel the LLC's registration.

Filing Forms

All forms currently accepted by the Ohio Secretary of State for registration of and changes to LLCs will no longer be accepted starting February 11, 2022. After February 11, 2022, LLCs must utilize the new forms available on the Ohio Secretary of State's website to register or make amendments to an LLC.

Ability to Modify Ohio Default Rules by Operating Agreement

The Original Act and the Revised LLC Act both provide for a set of default rules that govern the operation, structure, and authority of an LLC. However, LLCs are generally free to amend the default rules contained in the ORC using the LLC's operating agreement. The Original Act allows these types of modifications by inserting the clause, "unless otherwise provided in the limited liability company agreement" after default provisions that the ORC drafters intended to be modifiable. The Revised LLC Act takes a different approach to obtain the same result. The Revised LLC Act removes the clause, "unless otherwise provided in the limited liability company agreement" and, instead, provides a section listing specific default provisions that cannot be altered, while maintaining the general rule that default provisions may be altered by the LLC's operating agreement.

Fiduciary Duties

The Revised LLC Act also allows for an enhanced ability of members, managers, and officers of an LLC to modify the fiduciary duties they owe pursuant to Ohio law. Where the Original Act does not allow for complete elimination of the fiduciary duties of members, managers, and officers, the Revised LLC Act allows for the elimination of all fiduciary duties except for the duty of good faith and fair dealing.

Series LLCs

The Revised LLC Act will allow the formation of Series LLCs in Ohio. A Series LLC may be formed through an election in the LLC's Articles of Organization and provides another avenue by which assets can be protected under an LLC structure.

Like a corporation with subsidiaries, a Series LLC structure allows a business entity to segregate assets into separate legal entities situated under a parent or umbrella LLC. As long as the assets in each series stay separate from the assets of the other series, Series LLCs provide asset protection between all of the entities in a Series LLC. In other words, if structured properly, the individual entities within a Series LLC will not be responsible for the liabilities of the other entities in the Series LLC.

Series LLCs are only useful in a limited set of circumstances such as situations involving ownership of several real estate properties. If you think your business structure may benefit from the formation of a Series LLC, be sure to consult an attorney before proceeding.

Because of this shift in LLC law, it is generally advisable to consult legal counsel in order to adapt your LLC's operating documents to the provisions of the Revised LLC Act. Wegman Hessler stands ready to assist you or your business with navigating these changes in the upcoming months and beyond. If you have any questions or need assistance, please do not hesitate to contact a Wegman Hessler Business Services attorney.